IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 794

O. A. CARGILL, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

I

The Government, in responding to the first of the questions presented, in effect suggests an additional ground for granting the writ: the conflict among the Circuits in construing the rule of *Dennis* v. *United States*, 384 U.S. 855 (1966).

The Government indicates (Br. Opp. 6) the contrast between the liberal construction of *Dennis* adopted by the Tenth Circuit in the instant case and the subsequent construction of *Dennis* by the Eighth Circuit in *National Dairy Products Corp.* v. *United States*,

No. 18,737 (8th Cir. October 27, 1967). *National Dairy Products Corp.* expressly rejected the rule for production of grand jury minutes established by the Tenth Circuit in the instant case, and the rule established by the Second Circuit in *United States* v. *Youngblood,* 1 CrL 2193 (2d Cir. June 21, 1967). The Eighth Circuit stated:

> "*Cargill* v. *United States,* 1 CrL 2311 (10th Cir. 1967) * * * interpreted the *Dennis* opinion as abrogating the substance while retaining the form of the particularized need requirement. It adopted a course of wide open disclosure, subject to a protective order, whenever the defense makes a specific request for a transcript of the witnesses' grand jury testimony to be used in his cross-examination or for one of the other purposes mentioned in *Dennis.* * * *
>
> *We do not regard the holding in Dennis to require the practice adopted by the Second Circuit in Youngblood, supra. Neither do we subscribe to the concept that the defense is entitled to the grand jury transcript upon timely request irrespective of the circumstances involved which seems to be the rule established for the Tenth Circuit in Cargill, supra.* We believe a showing of 'particularized need' under the *Dennis* standards is still required. We hold only that where the prosecution itself has used the grand jury testimony during the course of the trial, that fact in itself is sufficient to constitute a showing of particularized need. Otherwise, a showing of particularized need depends upon the circumstances of each case." *National Dairy Products Corp.* v. *United States, supra,* 2 CrL 2141, 2142 (emphasis supplied).

Moreover, the Tenth Circuit in the instant case distinguished its own ruling from the "somewhat broader

rule" laid down by the Second Circuit in *United States* v. *Youngblood, supra.* (Pet App. 7a.)

Questions as to the scope of the *Dennis* rule for production of grand jury minutes may be expected to arise in virtually every case prosecuted in the federal courts by indictment, until this Court defines the applicable rule and resolves the conflict among the circuits. The first of the questions presented in the instant petition asks the Court to determine the test of harmless error for violations of the *Dennis* rule. In determining the harmless error issue here, the Court, if certiorari is granted, will presumably be confronted[1] with the threshold issue of whether the assertedly harmless error in withholding the minutes was error at all under a proper construction of *Dennis.*

The Brief in Opposition appears to ignore the question of what the test of harmless error should be for violations of the *Dennis* rule (question 1(a) in the Petition). The Brief in Opposition does not suggest a test; nor can it be said to endorse any test expressed by the court of appeals—for that court's opinion was silent upon the question of whether the *Dennis* rule violation prejudiced petitioner upon Count 3 (see Pet. 11-12 and n. 2). The Government's contention that "the determination by the court below involve[d] a specific factual evaluation of the evidence in this case which is fairly supported by the record" (Br. Opp. 6), is unsupported by any citation to the court's opinion. But even if the court below had made such "a specific, factual evaluation of the evidence", this would

[1] Unless the point has been waived by the Government's failure to seek review of the portion of the Tenth Circuit's judgment reversing counts 1 and 2.

mean nothing unless the appellate court had applied a correct legal test of harmless error. And the Brief in Opposition certainly does not state what the appellate court's test of harmless error was. At best the Government's argument would warrant a remand to the court of appeals for "a specific, factual evaluation of the evidence" after this Court had determined the legal test of harmless error to be applied.

Perhaps the Government implies a test of harmless error in stating its version of the first question presented as:

> "Whether having reversed petitioner's convictions on two counts of perjury because the trial judge failed to turn over the grand jury testimony related to those two counts, the court of appeals should have also reversed petitioner's conviction on a third perjury count *even though that count was fully supported by other evidence.*" (Br. Opp. 2, emphasis supplied.)

But the test of harmless error for denial of impeachment material has never been whether the "count was fully supported by other evidence" than the testimony which could have been impeached. See, e.g., *Rosenberg* v. *United States*, 360 U.S. 367, 370-71 (1959); *Killian* v. *United States*, 368 U.S. 231, 243-44 (1961); Pet. 10-11. The test cannot be whether, having mentally subtracted Carroll's testimony on Count 3, there would be sufficient evidence to affirm a conviction on that count. Rather, the test must be in terms of whether cross-examination of Carroll with the assistance of the grand jury minutes could have affected the petit jury's verdict on count 3. Significantly, the Govern-

ment which has had access to the grand jury minutes[2] does not argue that they contain no material helpful for cross-examination, or no material not otherwise furnished to the defense. Nor did the court of appeals make any finding that the minutes were devoid of impeachment material on any count.

It should also be noted that the trial testimony which the Government now describes as "the only testimony of Carroll at all relevant to count 3" (Br. Opp. 6), and now labels "insignificant . . ." (Br. Opp. 7), was described to the jury by Government counsel as testimony "which is very significant, and which alone establishes" the allegations of count 3. (R. 1294; see Pet. 14.) No test of harmless error should be countenanced which allows the prosecution to argue to the jury that an item is important, and to the appellate courts that it is not.

Nor is the potential effect of the minutes in discrediting Carroll's testimony the only criterion of harmless error. The minutes might well have served to discredit Corn. The chief bulwark of both Corn's and Carroll's credibility was the testimony of the other. (As the Government put it: "Justice Corn confirmed Carroll's testimony concerning the $150,000 transaction", Br. Opp. 4, n. 2.) The grand jury minutes might have enabled the defense to elicit testimony from Carroll which would conflict with Corn's version,

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[2] The minutes were sealed by the trial court. The court of appeals, both before (R. 1528) and after rendering its opinion that the minutes should have been produced at trial, denied petitioner's motions to inspect them for purposes of the appeal. (The motions and rulings in the court of appeals, and the sealed grand jury minutes, are included in the record transmitted to this Court.)

and thus damage the credibility of both. *E.g.*, the Brief in Opposition asserts that the Carroll-Corn bribe agreement in the Selected Investments case was made "In March 1957" (Br. Opp. 3). In support of this the Government cites only testimony of Carroll (Br. Opp. 3, citing R. 341-348). But the cited testimony does *not* place the agreement in 1957. Carroll testified that the conversation agreeing to the bribe was "in November or December, and I think it was '56, but it could have been in November or December of '55. . . ." (R. 343.) Corn testified that the Selected Investments case was pending in the Oklahoma Supreme Court from 1954 to 1957 (R. 510). Corn's claim that as a result of his bribe conversation with Carroll, Corn called petitioner to offer him $2,500 to fix Justice Carlisle (R. 510, cited Br. Opp. 4, n. 2)[3] would be destroyed if Carroll's conversation with Corn was shown to be earlier than about September, 1956.[4] For Justice Carlisle was not even appointed to the Oklahoma Supreme Court until September 17, 1956 (R. 1445). The grand jury minutes might thus have enabled petitioner to develop a fatal contradiction between Carroll and Corn, and so undermine the credibility of Corn—whom the Government grants gave the principal testimony on count 3 (see Br. Opp. 6).

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[3] Justice Carlisle was deceased at the time of trial (R. 1144-45).

[4] Corn's own pretrial statement indicates that the earlier date ought to be established—especially if Carroll's grand jury testimony were to the same effect. In a pretrial statement to government attorneys, Corn placed his agreement with Carroll in 1956 (R. 1465), and said that "just as soon as Hugh Carroll gave me the proposition" Corn called petitioner to offer him $2,500 for Justice Carlisle's vote (R. 1472). Corn also said: "It was a long time after I made that deal with Hugh Carroll before the opinion was ever adopted." (R. 1475.) Before giving the statement, Corn had read a statement given by Carroll (R. 1472).

II

The Government seeks to avoid the second of the questions presented by contending that: "Petitioner was not the target of the grand jury investigation at the time he was subpoenaed to testify." (Br. Opp. 7; footnote omitted.) But it is farfetched to contend that petitioner was not a target of the grand jury's investigation, in light of the questions which were propounded to him and form the subject of the instant indictment, and which were obviously based upon Carroll's grand jury testimony of the day before (see Pet. 4-5, 19-20). The Government apparently seeks to suggest that, when petitioner testified on April 7, 1964, the grand jury was only investigating income tax violations (Br. Opp. 3, 8 and n. 6). But the Deputy Attorney General's letter of authorization defining the scope of the grand jury investigation, dated March 20, 1964, included alleged "violations of the internal revenue laws of the United States, as well as violations of the perjury, bribery and other criminal laws of the United States and conspiracy to commit all such offenses." (R. 1420.)

The opinion below certainly does not reason that petitioner was not a prospective defendant when he testified under subpoena; on the contrary the court below recognized that, "It is apparent that the accused was facing a dilemma" before the grand jury. (Pet. App. 9a.) Perhaps what the Government means is that petitioner did not become the target of a perjury prosecution until the Government had obtained a second witness by the statement of Corn (see Br. Opp. 8, n. 6). But Carroll's testimony had originally made petitioner a target for prosecution upon the substantive conduct of which Carroll accused him—conspiracy

to obstruct justice and subborn perjury in Carroll's federal bankruptcy proceeding. The Government cannot retroactively cure the impropriety of subpoenaing petitioner—if subpoenaing a target of the investigation is improper—by the device of indicting petitioner for denying instead of for committing the conduct under investigation.

Nor should it be suggested that it "rings particularly hollow" (Br. Opp. 8) for an attorney-witness, any more than a lay witness, to protest a practice which, "one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from. . . ." *United States* v. *Scully*, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955), per Medina, J. (see Pet. 14). The validity of the practice of subpoenaing a prospective defendant is squarely presented by this perjury case, just as squarely as it would have been under a charge of conspiracy to obstruct the bankruptcy proceeding.

III

The Government relegates to a footnote (Br. Opp. 9, n. 7) the applicability of the *Delaney* rule to state legislative proceedings, presented as petitioner's third question. The attempted distinction, that "the state legislative proceedings were not directed at petitioner" (*ibid*), cannot hold water. For the proceedings were directed at impeachment of State Supreme Court Justices on allegations of having received bribes from petitioner. Petitioner, like Mr. Delaney, did not even have the opportunity to mitigate the prejudicial effects of the legislative testimony through cross-examination of the witnesses or offering of rebuttal testimony in

the legislative proceedings. See *Delaney* v. *United States*, 199 F.2d 107, 113 (1st Cir. 1952).

In *Delaney*, too, the jurors affirmed that they would decide guilt solely upon the evidence produced in court. *Id.* at 116. But the court ruled:

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity." *Id.* at 112-13.

The ten volumes of newspaper clippings in the instant record show publicity surely no less pervasive or prejudicial than in *Delaney*. The merits of the third question presented should be reached.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the Brief in Opposition demonstrates no reason why the questions presented by the petition lack importance, or lack merit on the present record. For these reasons and the reasons presented in the petition, petitioner respectfully prays that the petition be granted with respect to each of the questions presented.

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